IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

CHARLES GREGORY WATKINS,
Petitioner.

No. 2 CA-CR 2013-0418-PR
Filed January 7, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Maricopa County
No. CR2009125061001DT
The Honorable Lisa Daniel Flores, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Susan L. Luder, Deputy County Attorney, Phoenix
Counsel for Respondent

Charles Watkins, Buckeye
In Propria Persona

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Chief Judge Howard and Presiding Judge Vásquez concurred.

M I L L E R, Judge:

¶1 Charles Watkins petitions this court for review of the trial court's order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Watkins has not met his burden of demonstrating such abuse here.

¶2 Watkins was convicted after a jury trial of possession of cocaine base for sale and possession of drug paraphernalia and sentenced to mitigated, concurrent prison terms, the longer of which is fourteen years. His convictions stemmed from an incident in which police officers called a cellular telephone number to arrange a drug buy. An officer agreed with the female who answered the telephone to meet in a restaurant parking lot for the officer to purchase crack cocaine. Officers saw a sport utility vehicle (SUV) enter the parking lot and circle several times before exiting; they then stopped the SUV for a traffic violation. The female driver admitted she was the one who had spoken with the officer on the telephone. Officers found in the backseat area of the SUV a clear pipe and 570 milligrams of cocaine base. Watkins, the passenger, was arrested and searched. Officers found in his possession approximately $1,600 in cash, the same cellular telephone used to arrange the drug transaction, and a small amount of cocaine base. We affirmed Watkins's convictions and sentences on appeal. *State v. Watkins*, No. 1 CA-CR 10-0189 (memorandum decision filed Oct. 13, 2011).

¶3 Watkins filed a notice of post-conviction relief, and appointed counsel filed a notice stating he had reviewed the record but was "unable to discern any colorable claim upon which to base a Petition for Post-Conviction Relief." Watkins then filed a pro se petition claiming his trial and appellate counsel had been ineffective. He argued trial counsel "fail[ed] to prepare and present a proper defense" because he did not 1) investigate and present evidence that the cash Watkins had at the time of his arrest originated from a "[P]ell [G]rant and a loan to attend college"; 2) investigate the name of the account holder for the cellular telephone; and 3) have the glass pipe found in the vehicle examined for fingerprints. And he contended appellate counsel should have challenged on appeal 1) the trial court's denial of his motion to suppress based on the purportedly improper traffic stop; 2) the indictment based on purportedly perjured testimony; and 3) the admission of "hearsay statements" at trial.

¶4 The trial court summarily denied relief. It concluded there were valid, strategic reasons for trial counsel not to have pursued the various avenues of investigation because those avenues were unlikely to have aided Watkins's defense. It also rejected his claims related to appellate counsel, determining the various arguments proposed by Watkins would not have been successful on appeal and thus that counsel "did not fall below an objective standard of reasonableness" in declining to raise those arguments.

¶5 On review, Watkins repeats his claims of ineffective assistance of trial counsel but identifies no factual or legal error in the trial court's rejection of those claims. And we have reviewed the record and find no error in the court's thorough reasoning and decision. Accordingly, we adopt it. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶6 Watkins also reurges his claims of ineffective assistance of appellate counsel. To establish a colorable claim of ineffective assistance of appellate counsel, Watkins must show counsel's performance was deficient and that there is a "reasonable probability . . . but for counsel's unprofessional errors, the outcome

of the appeal would have been different." *See State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995).

¶7 Walker insists the traffic stop of his vehicle was improper—and thus that appellate counsel should have raised the issue—because "there was nothing suspicious about a random vehicle pulling into a place of business that was open" and, in any event, the stop was improper because it was "pretextual." But Watkins ignores that the stop was based on a traffic violation—not on the driver's conduct in the parking lot.[1] Watkins does not assert there was no traffic violation justifying the stop. *See generally State v. Livingston*, 206 Ariz. 145, ¶ 9, 75 P.3d 1103, 1105 (App. 2003) (law enforcement officer effectuating the stop need only have reasonable suspicion to believe individual committed traffic violation). And Watkins is incorrect that the stop would be improper if it was pretextual. *Jones v. Sterling*, 210 Ariz. 308, ¶ 11, 110 P.3d 1271, 1274 (2005) ("[E]vidence seized as a result of a traffic stop meeting 'normal' Fourth Amendment standards is not rendered inadmissible because of the subjective motivations of the police who made the stop.").

¶8 Watkins also claims that appellate counsel was ineffective in failing to argue on appeal that the indictment should have been dismissed with prejudice because the officer who testified before the grand jury incorrectly stated that the restaurant was closed at the time and that the substance found in Watkins's pocket was cocaine base although it apparently had not yet been tested. But he cites no authority and develops no meaningful argument that

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[1]The judge that ruled on Watkins's petition for post-conviction relief determined the stop was justified because police officers had probable cause based on the arranged drug buy. The judge that presided over Watkins's trial, however, found the stop was justified based either on the traffic violation or reasonable suspicion based on the arranged drug transaction. Because we may affirm for any reason supported by the record, we need not address whether there was any basis for the stop other than the traffic violation. *See State v. Olquin*, 216 Ariz. 250, n.5, 165 P.3d 228, 231 n.5 (App. 2007).

he is entitled to relief on this ground. Notably, although he generally asserts the officer's testimony constituted perjury, he cites no evidence supporting that assertion or contradicting the officer's testimony that the misstatements were unintentional. *See State v. Gortarez*, 141 Ariz. 254, 258, 686 P.2d 1224, 1228 (1984) (only exception to special action challenge of grand jury proceedings is when the proceedings are tainted with information the State knew was based on perjured, material testimony). Accordingly, he has waived this argument on review, and we do not address it further. *See* Ariz. R. Crim. P. 32.9(c)(1) (petition for review shall contain "specific references to the record"); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument waives claim on review).

¶9 Finally, we reject Watkins's argument that the trial court erred in concluding appellate counsel need not have raised an argument that the driver's statements were admissible as statements by a coconspirator pursuant to Rule 801(d)(2)(E), Ariz. R. Evid. That rule provides that a statement is not hearsay if it is offered against a party and was "made by the party's coconspirator during and in furtherance of the conspiracy." Ariz. R. Evid. 801(d)(2)(E). "The statement must be considered but does not by itself establish . . . the existence of the conspiracy or participation in it." Ariz. R. Evid. 801(d)(2).

¶10 Thus, there must be independent evidence sufficient to establish a prima facie case of conspiracy. *See State v. Fletcher*, 137 Ariz. 306, 309, 670 P.2d 411, 414 (App. 1983). Despite Watkins's contrary claim, however, such evidence exists here—Watkins was in a vehicle with another person with drug paraphernalia, and a saleable amount of cocaine in open view, and within ready access of either of the vehicle's occupants.

¶11 For all these reasons, although review is granted, relief is denied.